

Yang (Migration) [2018] AATA 4211 (14 August 2018)

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DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Ms Han Yang
CASE NUMBER:	1620145
DIBP REFERENCE(S):	CLF2013/288244
MEMBER:	David Barker
DATE:	14 August 2018
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal affirms the decision not to grant the applicant a Partner (Residence) (Class BS) visa.

Statement made on 14 August 2018 at 10:18am

CATCHWORDS

MIGRATION – Partner (Residence) (Class BS) visa – Subclass 801 (Spouse) – false or misleading information – date relationship ceased – forensic examination of statutory declaration – authenticity of sponsor’s signature – threats by sponsor on visa status – access to bank accounts – communication correspondence – sanitary conditions in home country – interests of child – decision under review affirmed

LEGISLATION

Migration Act 1958 (Cth), ss 6, 65, 359A, 376
Migration Regulations 1994 (Cth), Schedule 2 cl 801.226, Schedule 4 PIC4020

CASES

Arora v MIBP [2016] FCAFC 35
Batra v MIAC [2013] FCA 274
Kaur v MIBP [2017] FCAFC 184
Plaintiff M64/2015 v MIBP [2015] HCA 50
Trivedi v MIBP [2014] FCAFC 42

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 378 of the Migration Act 1958 and replaced with generic information.

STATEMENT OF DECISION AND REASONS

3. ISSUE

4. The issue in this review is whether the visa applicant meets Public Interest Criterion 4020 (PIC 4020) as required by cl.801.226 for the grant of the visa. Broadly speaking, this requires that:
 - there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: PIC 4020(1); and
 - the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy PIC 4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2) and (2AA); and
 - the applicant satisfies the Minister as to his or her identity: PIC 4020(2A); and
 - neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2B) and (2BA).
5. The requirements in PIC 4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: PIC 4020(4). However, this waiver does not apply to the identity requirements in PIC 4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.

APPLICATION FOR REVIEW

6. The applicant applied for review of a decision made by a delegate of the Minister for Immigration on 22 November 2016 to refuse to grant the applicant a Partner (Residence) (Class BS) visa under s.65 of the *Migration Act 1958* (the Act).
7. The applicant applied for the visa on 20 November 2013. The delegate refused to grant the visa on the basis that the applicant did not satisfy the requirements of cl.801.226 of Schedule 2 to the Migration Regulations 1994 (the Regulations) because they determined she had provided false or misleading information to the Department of Immigration and Border Protection (the Department), on her visa application, regarding her relationship with her sponsor and there were no compelling circumstances affecting the interests of Australia; or compassionate or compelling circumstances affecting the interests of the Australian citizen, Australian permanent resident or an eligible New Zealand citizen which would justify the grant of the visa.
8. The applicant appeared before the Tribunal on 20 April 2018 to give evidence and present arguments. The Tribunal also received oral evidence from Ms Michelle Novotny. The Tribunal hearing was conducted with the assistance of an interpreter in the Mandarin and English languages.

9. The applicant was represented in relation to the review by her registered migration agent.
10. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

BACKGROUND

11. The applicant is a national of China and is 27 years old. She first arrived in Australia on a subclass 571 student visa in October 2008. She was granted further student visas, the last of which ceased in March 2014. The applicant's sponsor is also a Chinese national, who became a permanent resident of Australia in 2009. He is 26 years old. The applicant's visa application states the parties met in Ashgrove, NSW in December 2011 and were subsequently married in Sydney, NSW in October 2013. The applicant was granted a subclass 820 provisional partner visa in December 2014.
12. The decision record of the delegate from the Department, a copy of which was provided with the review application, states that on 2 October 2015 the Department received, as part of their processing of her application for the subclass 801 permanent partner visa, documentary evidence of co-habitation from the applicant, where she claimed to be still in a genuine and continuing relationship with her sponsor. The Department then received further information, on 15 March 2016, which indicated that the spousal relationship upon which her partner visa application was based had ceased and the sponsorship had been withdrawn. The Department wrote to the applicant on 5 April 2016, inviting her to comment on this information.
13. On 24 May 2016, the applicant's authorised representative contacted the Department and advised the parties' relationship had ended as a result of the applicant [experiencing issues with] her sponsor. The applicant was contacted by the delegate on 10 June 2016 and at that time confirmed that the parties' relationship ended on 29 February 2016.
14. On 21 June 2016, the delegate wrote to the applicant and invited her to comment on unfavourable information received by the Department, which did not support her application for the subclass 801 permanent partner visa. The delegate noted this information included that:
 - the applicant's relationship with her sponsor ended before 9 October 2015;
 - the applicant submitted several documents to the Department, including a statutory declaration from her sponsor dated 9 October 2015, which were not written, completed or signed by her sponsor;
 - further, despite the parties' relationship ending before October 2015, the applicant submitted several misleading documents to show that she was still in a genuine relationship with her sponsor prior to it ceasing.
15. The Department received a response from the applicant on 19 July 2016 and 1 August 2016. The delegate noted that in these responses the applicant denied she had completed the statutory declaration and signed it on the sponsor's behalf and she maintained that the sponsor had himself completed the form and also signed it. The delegate noted that a forensic examination of the statutory declaration which the applicant claimed was executed by her sponsor was conducted by a specialist Departmental forensic document examiner and it was found that there was very strong support for the proposition that the document she had provided, namely, the

statutory declaration written and signed by her sponsor, was found to have been written and signed by a person that was not her sponsor. The delegate stated that the questioned signature was unnaturally written displaying a lack of fluency and numerous dissimilarities when compared to sample signatures of the sponsor. Given the differences in the sequence of strokes and complexity of the Chinese character formations observed between the document she had provided and the sponsor's handwriting and signature, it was found that the statutory declaration which she purported to have been written and executed by her sponsor was executed by a different person who was not her sponsor.

16. The delegate found that the sponsor had given information to the Department that was false or misleading in a material particular and as a result she failed to satisfy PIC 4020, subclause 4020(1). The delegate noted no information had been submitted indicating the applicant was seeking a waiver of PIC 4020 and found there were no circumstances that would justify the granting of the subclass 801 permanent partner visa.
17. On 19 June 2017, the applicant's representative contacted the Tribunal and requested high definition scans of certain documents from the Department's file that had been released to the applicant. The Tribunal provided scans of the requested documents to the applicant's representative on 7 August 2017, however on 31 August 2017, the representative contacted the Tribunal and indicated their experts who were investigating the signatures had indicated the pixel density of the scanned documents was not sufficiently high for them to proceed with their investigations of the documents.
18. On 13 November 2017, the Tribunal received a request for a postponement in a hearing that had been set down for 13 December 2017 on the basis that the applicant was due to give birth to a child on or around the hearing date. The Tribunal consented to this request and scheduled a further hearing date on 19 January 2018.
19. On 18 January 2018, the Tribunal received submissions and documentary evidence from the applicant in support of her claim and a decision was made to postpone the hearing set down for 19 January 2018 in order to provide the Tribunal with adequate time to consider the submissions and documentary evidence prior to taking oral evidence at a hearing.
20. The documentary evidence provided to the Tribunal on 18 January 2018 included a report from Ms Novotny, forensic document and handwriting examiner, which raised concern regarding the limitations on her ability to provide an opinion as to the Department's examination of the signature on the statutory declaration purportedly signed by the sponsor, due to a lack of information regarding the methodology used by the Department's forensic signature examiner.
21. *The s.376 Certificate*
22. In their initial submissions to the Tribunal the applicant's representative submitted the opinion of the Department's forensic document examiner could not be relied on as it was technically and professionally impossible for the Department to arrive at their conclusion on the basis of an opinion from an '*alleged specialist*' Departmental forensic document examiner and that the conclusions reached from the alleged forensic examination were not independently verifiable. In support of this claim the representative referred to comments made by Ms Novotny in her report dated 6 December 2017. The Tribunal was aware that the report of the Department's forensic document examiner was amongst documents that were subject to a

certificate issued by the Department under section 376 of the Act. The action of this certificate, if the Tribunal was to accept it was valid, is to place at the discretion of the Tribunal what information from the specified documents is made available to the applicant.

23. The Tribunal determined it was appropriate, in the interest of procedural fairness, to exercise this discretion and on 25 January 2018, wrote to the applicant, pursuant to s.359A of the Act, inviting her to comment on particulars of information which would, subject to her comments and response, provide the reason or part of the reason for affirming the Department's decision to refuse her application for the subclass 801 permanent partner visa. The particulars of information provided to the applicant included some details from the report of the Department's forensic document examiner, explaining the methodology used in that report and also copies of the signature examples utilised by the Department's forensic document examination unit in the examination of the document purportedly signed by the sponsor. The particulars of information put to the applicant also included information provided to the Department by the sponsor in support of his claim as to when the parties' relationship ceased.
24. On 30 January 2018, the representative contacted the Department and confirmed receipt of the letter sent on 25 January 2018 and noted they would be passing it on to their forensic specialist for their further comments. Subsequent to further enquiries from the representative the Tribunal advised the representative on 15 February 2018 that the Tribunal did not consider it appropriate to provide the original documents referred to in the s.359A letter and that it was also unable to provide scans of the original documents at the 600 DPI resolution requested by the representative.
25. On 20 February 2018, the Tribunal received further submissions and documentary evidence from the applicant's representative.
26. On 13 June 2018, the Tribunal ascertained it was possible to provide the applicant with copies of the sponsor's sample signatures in the requested 'tif' file format and at the higher 600 DPI resolution and forwarded these copies and provided her until 11 July 2018 for any further comments and submissions she would care to make before a decision was made in this matter.
27. On 22 June 2018, the Tribunal received an email from the applicant's representatives seeking clarification as to whether the aforementioned higher resolution scans were scans of original documents. The Tribunal responded to this request by identifying which scans were taken from original documents and which were scans of copies of documents.
28. On 9 July 2018, the Tribunal received an email from the migration agents representing the applicant advising of a change in the applicant's representative and also advising the applicant was intending to obtain a new independent expert forensic report for the purpose of analysing and scrutinising the documents which were provided by the Tribunal on 13 June 2018. The representative also advised that the forensic expert previously utilised was unavailable to prepare this new report. The representative requested further time to provide further submissions and comment to the Tribunal and this request was granted, with the Tribunal informing the representative that further submissions and comment should be provided by 7 August 2018.
29. On 11 July 2018, the Tribunal received an email from the representative stating it was their understanding they had been provided with photocopies of the photocopied

version of the original documents and requested the original copies of the documents that were previously examined by the Department of Home Affairs' expert to be couriered to the laboratory in Canberra of the new forensic expert they had approached to undertake the further forensic examination. The Tribunal subsequently sent the Tribunal a further email on this date advising that the Department of Home Affairs has previously hand delivered, not couriered, original documents to the laboratory of the forensic expert in Canberra.

30. On 7 August 2018 the Tribunal received a written submission and statutory declaration from the applicant's representative.
31. **The Hearing on 28 April 2018**
32. The Tribunal sought submissions from the applicant and her representative at the start of the hearing on 20 April 2018 as to the validity of the s.376 certificate. The applicant indicated she would rely on submissions from her representative with respect to this issue, who submitted the certificate appeared to be validly issued.
33. The Tribunal has determined that the s.376 certificate is a valid certificate, as it is satisfied it is in the public interest that internal correspondence between the Department's [Processing] Centre and Document Examination units not be released, as some of this information could prejudice the effectiveness of the methods and procedures used by these units within the Department. The Tribunal is also satisfied that release of all correspondence between the Department and the sponsor is not in the public interest because the full release of this information may jeopardise the third party's safety.
34. *The applicant's evidence*
35. With respect to the delegate's decision to refuse her application for the subclass 801 permanent partner visa, the applicant said she considers the decision to be unfair to her because the Department had the discretion to undertake the forensic examination of the sponsor's signature and that she was not aware they had done so. She said a person's signature may change because of a range of factors and she cannot agree with the delegate's decision.
36. With respect to whether she had, by providing the statutory declaration dated 9 October 2015 signed by the sponsor, provided the Department with false and misleading information in a material particular, the applicant made the following points:
 - she did not forge any statutory declaration or signature;
 - she is not sure if the contents of the statutory declaration were written by the sponsor as the document was not prepared by him in front of her;
 - she is sure the sponsor was fully aware of the contents of the statutory declaration as she and the sponsor went through the contents together to make sure there were no mistakes, before he then signed the statutory declaration in front of her;
 - after the sponsor had signed the statutory declaration, he told her he had things to do and so she took both his statutory declaration and the statutory declaration she had prepared and signed to the office of the migration agent, she was then assisted by, so that they could be certified by a lawyer. (The sponsor used to work as an assistant to a migration agent and therefore he knew more about the processes involved in visa applications and this is why

she did what he said). The migration agent who was then assisting her did not advise her as to the proper procedures for signatures to be certified on a statutory declaration.

37. With respect to the anonymous allegation received by the Department in October 2015 that the parties' relationship had ceased, the applicant said the parties' relationship ceased on 29 February 2016. She said their relationship deteriorated around October 2015 and that the main reason was because the applicant did not have spare money to lend the sponsor for his gambling. She said he borrowed money from his friends and then he avoided coming back to their home because he wanted to avoid those friends. The applicant said she and the sponsor were having arguments from around January 2015 but that they settled the arguments and she believed that they both loved each other. She said that is why the sponsor left her a Facebook message on 21 December 2015 expressing his love for her.
38. The Tribunal noted the applicant appeared to have told the social worker that prepared a report [that] there were difficulties in the parties' relationship from March 2015, whereas she subsequently, in the statutory declaration she signed on 9 October 2015, described her relationship with the sponsor as loving and supportive. In response to this, the applicant said the sponsor started to become addicted to gambling around March 2015 and as she is a traditional Chinese woman she believed every marriage has twists and turns and could overcome problems. She said when the sponsor started to become addicted to gambling he would show guilt to her and tell her he loved her and that he always apologised to her after beating her. She said this would cause her to have hope her relationship with the sponsor would continue.
39. The Tribunal asked the applicant if she wished to make any comments during the hearing with regard to the particulars of the information provided by the sponsor to the Department, which were outlined in the letter sent to her by the Tribunal pursuant to s.359A of the Act. This information was that:
 - the parties' relationship ceased on or around 26 June 2015;
 - some contact between the parties occurred after 26 June 2015 by phone or WeChat;
 - during some of these interactions the applicant offered to pay the visa sponsor for the sponsorship, despite their relationship having ceased;
 - the parties did not socialise after 26 June 2015;
 - deposits into the parties' joint account in the period from July 2015 to February 2016 reflect funds transferred into the account by Ms Yang;
 - the visa sponsor did not sign any documents after those documents he signed in 2014, at the time of the initial visa application.
40. With respect to this information, the applicant said the sponsor's declaration they did not engage in social activities after June 2015 is not correct and to support this claim she has provided photos to show they attended several social occasions. In relation to the sponsor's claim he did not use funds from their joint account, the applicant said she has provided copies of the joint bank account to show transactions where the sponsor had used the account. The applicant denied offering the sponsor money to continue his sponsorship of her visa application.

41. The applicant said the parties' relationship deteriorated after November 2015 and that from that time he would threaten to withdraw his sponsorship if she did not give him money. She said she did not respond to these threats and the sponsor did not do anything. She said his threats and money demands increased in February 2016 and after she continued to not give him any more money, he contacted the Department and reported that she had faked her application for the subclass 801 partner visa.
42. As to whether, in the event the Tribunal was to determine she had provided a bogus document or false and misleading information, there are any compelling circumstances affecting the interests of Australia that would justify the grant of the visa, the applicant said there was not any such circumstances.
43. As to whether there are any compassionate or compelling circumstances affecting the interests of an Australian citizen, permanent resident or eligible New Zealand citizen that would justify the grant of the visa, the applicant gave evidence that in September 2017 she married a Chinese citizen who is a permanent resident of Australia and that she gave birth to their child in November 2017. The applicant said she is worried her child will be affected if she is not granted the visa and has to return to China, as her child will return with her and the sanitation circumstances are not as good in China as they are in Australia and she is worried how this would affect her child. She said she hopes her child is able to grow up in Australia.
44. *Evidence of Ms Novotny*
45. The Tribunal noted Ms Novotny had produced a report and also supplementary comments, in her role as a forensic document examiner and invited her comments with regard to the authenticity of the signature in the statutory declaration, which was purportedly signed by the sponsor or as to the report of the Department's forensic document examiner. In response to this invitation Ms Novotny made the following comments:
- the material provided to her after she had prepared her initial report is different to that which had been provided to her previously. However, in neither case did she undertake any assessment of the material in order to determine the genuineness of the signature;
 - with respect to the initial material provided to her, there were a number of significant limitations that precluded her examining the material so as to provide her opinion;
 - in terms of the further material provided more recently, this had resolved some of the limitations that were relevant to the previously provided material but sufficient limitations remained such that she was unable to undertake an appropriate examination of this material;
 - the further material was requested, which would have enabled her to undertake the required examination, but was not provided and she also received no instructions to undertake an examination of the supplementary material that was provided following her initial report;
 - the specific limitations that pertain to the further material is that no original documents were provided and no copies of the original documents, or signature examples, of a high enough quality were provided;
 - a further limitation was that whilst a reasonable number of specimen signatures were provided, it appeared that 14 of the 16 specimen signature examples were written at the same time, which means they do not tend to

exhibit the extent of natural variation in signatures which is an important consideration when undertaking a forensic examination of a signature. This could be a potential limitation but no actual comment could be provided on this issue as the extent to which it may be a limitation would only become apparent if an examination of the signatures was actually undertaken;

- it is also not apparent on what dates the signature examples were created. It is important that at least some of the signature examples were reasonably contemporaneous with the alleged date of the questioned signature. This is because signatures can show a natural variation as they evolve over time due to a range of possible factors. This could be a potential limitation but no actual comment could be provided on this issue as the extent to which it may be a limitation would only become apparent if an examination of the signatures was actually undertaken.

46. Ms Novotny told the Tribunal she could not usefully comment on the report of the Department's forensic examiner without seeing the full report. She said she would also need to examine the same signatures the Department's forensic examiner used in preparing their report before she would be in a position to provide comment on areas of agreement or disagreement with the findings of the Department's forensic document examiner.

47. **CONSIDERATION OF CLAIMS AND EVIDENCE**

Has the applicant given, or caused to be given a bogus document, or information that is false or misleading in a material particular?

48. The term 'information that is false or misleading in a material particular' is defined in PIC 4020(5) and the term 'bogus document' is defined in s.5(1) of the Act (see the attachment to this decision). In contrast to the definition of 'information that is false or misleading in a material particular' in PIC 4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.
49. The requirement in PIC 4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: PIC 4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.
50. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.
51. *The Department's concerns*
52. The delegate's decision indicates the Department's concern as to genuineness of the statutory declaration provided to them by the applicant, which was dated 9 October 2015 and purportedly signed by the sponsor, was prompted by information provided by the sponsor indicating the parties' relationship had ceased before 9 October 2015 and that he had not written, completed or signed the aforementioned statutory declaration. The Department's concerns as to the genuineness of this document

were increased by the findings of a forensic examination undertaken by a Departmental specialist forensic document examiner, who found there was very strong support for the proposition that the statutory declaration was written and signed by a person that was not the sponsor. On the basis of these concerns the delegate found that by providing the Department with the statutory declaration in question, the applicant had given information to the department that was false and misleading in a material particular and therefore did not meet PIC 4020.

53. I note the submissions of the applicant's representative are that the delegate concluded the applicant had provided false and misleading information purely on the basis of conclusions reached by the Department's forensic document examiner. I am not satisfied they have established this is the case, due to the references outlined above from the delegate's decision where they refer to information provided to them which prompted their natural justice letter to the applicant inviting comment on adverse information they had received. In any event, the Tribunal has undertaken its own consideration of the evidence and arguments that are currently available.

54. *What weight did the Tribunal accord to the opinion of Ms Novotny?*

55. I am satisfied that Ms Novotny is a forensic document and handwriting examiner who is qualified to provide expert opinion with regard to the authenticity of signatures. I found Ms Novotny to be a credible witness during the hearing who was demonstrably across her field of expertise and accordingly I have placed considerable weight on her oral evidence and the written report and supplementary comments from her which were provided with the review application. I am satisfied with the information Ms Novotny provided with regard to the procedures involved in undertaking a forensic examination of signatures and as to the limitations in the material she was provided with the initial report request from the applicant's representative, which resulted in her view she could not undertake the requested forensic document examination.
56. I have noted Ms Novotny's rationale for not undertaking a forensic document examination of the questioned signature, after she was provided with further information covered by the s.376 certificate, in light of her continuing to have concern the lack of access to original documents, or copies of a sufficient quality, but also due to her receiving no instructions from the applicant's representative that she undertake a forensic examination following on the provision of this further information to her. The Tribunal acknowledges it is unfortunate that it was not initially apparent to the Tribunal that copies of the documents, provided to her from the information covered by the s.376 certificate, were able to be provided in the requested 'tif' file format and at the requested 600 DPI resolution. This circumstance was rectified as soon as the Tribunal ascertained that copies of the documents could be provided in the requested file format and at the requested pixel density.
57. Whilst acknowledging Ms Novotny has given clear and cogent reasons as to why she is unable to provide an opinion as to whether the questioned signature is genuine or not, the essence of Ms Novotny's evidence is that she has not undertaken a formal forensic examination of the questioned signature of the sponsor on the statutory declaration, dated 9 October 2015 and is thereby unable to provide an opinion as to the authenticity of this signature. Ms Novotny has also provided clear evidence with respect to potential limitations that may impact forensic examination of signatures, based on considerations such as the context of when sample signatures were created and the temporal connection between sample signatures and the questioned signature. However, in my view Ms Novotny has also not provided specific comment on the observations made or conclusions reached by the Department's forensic

document examination unit, due to her lack of access to the full report of this unit and the original documents examined during the course of the preparation of the report of the aforementioned Departmental forensic document examiner.

58. *What weight has the Tribunal accorded to the report of the Department's forensic document examiner?*

59. On the basis of the information available to the Tribunal, some of which has not been made available to the applicant through the action of the s.376 certificate, I am satisfied the report from the Department's Forensic Identify Services Unit was prepared by a suitably qualified forensic document examiner. After undertaking a review of the methodology commonly used in forensic examination of documents, I am further satisfied that the methodology adopted by the Department's forensic document examiner is consistent with the accepted methodologies which are usually undertaken when asked to provide an opinion with regard to the genuineness of a signature and/or document. I have also noted the methodologies which the Department's forensic document examiner states were used in the course of preparing their opinion appear to be broadly consistent with those Ms Novotny described as appropriate in her oral evidence during the hearing.
60. I am not satisfied the evidence supports the claim made by the applicant's representative in their written submissions, dated 17 January 2018, which contend it was impossible for the Department's forensic examination to be conclusive and reliable due to the limited size of the sample signatures examined and the low image resolution of the sponsor's Chinese signature on his 2006 passport. The representative made this submission prior to the Tribunal making further information available to the applicant with regard to the signature samples and methodologies used by the Department's forensic document examiner.
61. The Tribunal acknowledges the applicant's concerns regarding the potential variation that may naturally occur in a person's signature over time and Ms Novotny's evidence with regard to this and related factors that could potentially influence the sponsor's signature and account for differences between the signature on the statutory declaration and those on the sample signatures available to the Department.
62. I have considered the representative's submission, received on 7 August 2018, which notes the new forensic expert they had consulted, Dr Steven J. Stach, had called into question the neutrality of the Department's forensic examination, due to the manner in which the sponsor's sample signatures were obtained. The representative has also submitted that there is no possible way for the Department's forensic examiner to conclusively and accurately determine whether the signatures were by the same person and therefore the results of the Department's forensic examination were unreliable and should not be accorded much weight by the Tribunal.
63. It is not apparent to me that the Department's forensic document examiner has not taken the possible variables identified by Ms Novotny into account in the course of undertaking the examination that led to their findings and conclusions. I am also not persuaded the opinion of Department's forensic document examiner lacks neutrality, or indeed on what specific basis this contention has been made. As a consequence, I am unconvinced as to why the Tribunal should not place weight upon the conclusions reached by the Department's forensic document examiner.
64. I do however note the conclusions reached by the Department's forensic document examiner are somewhat different to those attributed to them by the delegate in their

decision record and which are also attributed to them in the written submission from the representative which was received on 7 August 2018, where he disputes the capacity of the document examiner to 'conclusively' whether the signature in question is that of the sponsor. I note the applicant's initial representative also made submissions with respect to this issue.

65. I am satisfied it is appropriate to place weight on the actual conclusions reached by the Department's forensic document examiner. Accordingly, the Tribunal finds the Department's forensic document examiner opinion in relation to the signature on the statutory declaration in question is that the evidence provides qualified support for the proposition the questioned signature appearing is the product of simulation behaviour written by a writer other than the sponsor. The Tribunal further finds the Department's forensic document examiner opinion is that the evidence provides very strong support for the proposition that the original statutory declaration in question has been altered.
66. The applicant asserts the statutory declaration in question was signed by the sponsor in her presence. She gave evidence she is unsure if it was prepared by the sponsor, as she indicates she was not present when it was prepared. I accept that the applicant, in her written statements to the Department, did not previously claim the sponsor had completed this document and acknowledge the representative's submission with regard to this issue, where he highlights the delegates finding the applicant made such a claim.
67. I do not however accept the applicant's claim in the document referred to by her representative as '*Continued from Question 4 on 1410 FORM*' where at point '8' the applicant states '*On 10th March he threatened me again and mentioned that he would not only withdraw his sponsorship but would also tell DIBP that he didn't sign his statutory declaration if I cannot provide money to him*'. There is no suggestion the parties spoke to each other on 10 March 2016. In the translated electronic messaging from this date, which the applicant provided to the Department, the sponsor does refer to withdrawing sponsorship and reporting the applicant for committing fraud in her '*801 application*', there is no specific reference to the sponsor claiming he had not signed a statutory declaration. I am not convinced these electronic exchanges, in and of themselves, establish that the parties were in the period encompassed by these messages, namely October to March 2016, maintaining a genuine and continuing spousal relationship.
68. The applicant claimed the sponsor has in the past worked as an assistant to a migration agent and is therefore more knowledgeable about migration matters than her. She raised this claim in the context of the sponsor not being present so that a lawyer could witness his signature on the statutory declaration in question. The Tribunal is not satisfied this provides an adequate explanation for why the sponsor's signature on the statutory declaration was not appropriately witnessed and notes the absence of such a procedure does raise concern as to the authenticity of this document.
69. *Has there been a lack of procedural fairness to the applicant because Ms Novtony was not provided with the full report of the Department's forensic document examiner, or the original documents used in the course of preparing the report of the Department's forensic document examiner?*
70. In their oral submissions during the hearing, the applicant's representative contended the circumstances whereby the forensic document examiner engaged by the applicant was unable to undertake a formal examination and provide an expert

opinion with regard to the questioned signature and document due to the inadequacy of the example materials provided to them results in the applicant not receiving procedural fairness. The applicant's new representative reiterated these concerns in emails to the Tribunal and in the written submissions received by the Tribunal on 7 August 2018.

71. The Tribunal has considered this issue. The Tribunal notes that the documents in question were covered by the s.376 certificate, which the Tribunal is satisfied is valid due to the public interest issues involved. As is discussed elsewhere in this decision, the Tribunal has exercised the authority vested to it through the s.376 certificate and in the interest of according the applicant procedural fairness, released some of the documents and sample signatures which were in the material covered by the s.376 certificate. The Tribunal also provided information as to the methodology used by the Department's forensic document examiner in response to some of the concerns identified by Ms Novotny in her report.
72. I did not consent to the release of the original documents contained in the Department's file as this is not the usual practice of the Tribunal and in my view, it is necessary to ensure the documents are available for any future appropriate use by the Department, the Tribunal or other statutory bodies. I acknowledge the submissions in relation to the benefit of having access to the original documents but I am not persuaded it would be appropriate for the original documents in the Department's file to be released. I have also considered the more recent reported opinion from a different forensic expert that it would be inappropriate and unreliable to undertake a forensic document examination on anything but the original documents and that the opinion of Ms Novotny that an examination would be possible upon documents scanned in the requested file format at the requested pixel density should not be accepted.
73. I am not persuaded why the specifications and comments from Ms Novotny with respect to the basis on which a forensic document examination could take place should be disregarded. The Tribunal provided the applicant with copies of the documents and sample signatures at the highest resolution scan that was available to it through the current technology available to the Tribunal. I am satisfied that the best endeavours were made by the Tribunal with respect to this issue and the related issue of making transparent the methodologies used by the Department's forensic document examiner. I am aware that there was a delay in providing the document scans in the requested file format and at the requested pixel density, but consider the salient point to be the document scans were eventually provided in one of the requested format.
74. The applicant's initial representative submitted a further forensic examination should occur on a signature of the sponsor from an Acknowledgement of Service (Divorce) document. I am not satisfied this is necessary in this matter, as I am not convinced the applicant has demonstrated why the opinions of the Department's forensic document examiner should be disregarded.
75. The applicant's representatives have submitted that not providing the original documents upon which the Department prepared their forensic opinion about the sample signature results in the applicant not been accorded procedural fairness in this matter, as the signature in question was the sole consideration relied upon by the delegate when they decided to refuse the applicant's visa application. They also submit that the cost involved in seeking a formal report from a new forensic expert, when the original documents would not be available to that expert, were such that the applicant would be denied procedural fairness. The Tribunal does not accept theses

claims and is satisfied the applicant has been accorded procedural fairness in this matter. This is because the Tribunal has made the applicant aware of the basis on which the Department's forensic document examiner provided their opinion and given her a reasonable opportunity to provide submissions and comments she cared to make, to the extent that I deem it appropriate under the authority vested to the Tribunal pursuant to s.376 and s.359A of the Act. It is open to the applicant to have provided submissions, comments and other material in response to the information the tribunal has provided to her as she saw fit. In this matter, the Tribunal has provided the applicant with ample time to provide evidence and submissions in support of her claims and I am satisfied she has been accorded procedural fairness.

76. The Tribunal also notes that it has taken a fresh look at the available evidence and considered all of the available evidence, including the opinion of the Department's forensic document examiner. The Tribunal has noted the representative's concern as to the evidentiary basis on which the delegate made their findings but does not consider any such alleged narrow focus has been used by the tribunal when it has formed a view as to the authenticity of the signature in question in this matter.

77. *What weight did the Tribunal accord to evidence provided by the applicant in support of her claim as to when the parties' relationship ceased and the relevance of this to consideration of whether false and misleading information provided by her with her visa application*

78. The applicant contends the evidence which supports her claim the parties' relationship did not cease until February 2016 supports her claim the statutory declaration in question is a genuine document and that the sponsor's subsequent claim he did not sign this document was made vexatiously. The Tribunal accepts it is relevant to consider aspects of the evidence provided with the visa and review applications, so far as this is pertinent to the issues under consideration in this review, namely whether the applicant has given, or caused to be given a bogus document, or information that is false or misleading in a material particular.

79. The sponsor has provided a clear indication to the Department that the parties' relationship ceased in June 2015 and that he did not prepare or sign any documents pertaining to the applicant's visa applications beyond those completed in 2014 in association with her initial partner visa application. I am aware the applicant has claimed she is [experiencing problems] from around March 2015, which included threats to adversely affect her visa status in Australia. The Tribunal has not undertaken an assessment of the veracity of these claims, as they are not determinative to the issue which the Tribunal needs to consider. However I am of the view that the weight given to the sponsor's evidence needs to be considered in light of the possible motives and dynamics affecting parties where [issues] or other vexatious motives may be a factor. Notwithstanding this, I am not convinced the applicant has demonstrated why the sponsor's evidence should be disregarded.

80. *Bank records*

81. The applicant initially provided the Department evidence the parties' joint CBA account was closed on 29 February 2016. She claimed the sponsor closed the account after the parties' relationship ceased on that date. The sponsor has acknowledged he closed the account and claims transactions in the account between June 2015 and February 2016 were primarily undertaken by the applicant. The applicant provided further account records from this CBA account covering the period from 1 July 2015 to 31 January 2016. I have reviewed these accounts and am satisfied there is an indication on the account that Netbank transactions took place

between the parties' joint account and an account identified as in the name of the sponsor. The Tribunal is aware that Netbank transactions can be made by a person who has access to the CBA Netbank site and can potentially be made by a person, other than the person identified on the account name. In any event, whilst the records appear to potentially call into question the reliability of the sponsor's evidence and given the applicant has alleged the sponsor has tried to extort funds from her, at least in part through threatening her visa status, the Tribunal is not satisfied the records of the parties' joint bank account can be clearly viewed as evidence their relationship continued until February 2016.

82. *Witness support declarations*

83. The Tribunal reviewed the statutory declarations provided by the applicant's mother, stepfather and friends. The Tribunal has placed only limited weight on these declarations as they have been prepared by people connected to her and I am not convinced they provide an objective account of the parties' circumstances.

84. *Photographs and social media posts*

85. The sponsor has denied socialising with the applicant any time after their relationship ceased in June 2015. The applicant has provided two photographs which she claims demonstrates ongoing shared social activities between June 2015 and March 2018. Both of the photographs have supplementary information showing the date and location for where and when they were taken. The initial photograph is geotagged as being taken between 27 June 2015 and 28 June 2015 at a location in Darlinghurst or Surry Hills, NSW. I consider this photograph to not be inconsistent with information provided by the sponsor that he interacted with the applicant at a music performance at a city venue on or around those dates. Whilst acknowledging the dates do not precisely match, it is apparent that a photograph taken after midnight on an evening will have a different date stamp than a photograph taken at an earlier time of the same evening. As to the second photograph provided by the applicant, geotagged as taken on 28 September 2015 in Burwood and Botany Bay, NSW. I accept this photograph shows the applicant standing next to the sponsor at what appears to be a venue where he is musically performing.
86. It is of some note that the applicant has only provided two photographs, both of which appear to have been taken on a mobile phone, in response to the sponsor's claim they did not socialise together after June 2015. It is surprising the applicant has not produced more photographs of the parties either undertaking social activities together, or showing them together in more domestic settings during the period in question. I do not consider the sole photograph of the applicant standing near the sponsor at a music performance in September 2015 demonstrates the sponsor has given unreliable evidence in relation to this issue.

87. *Medibank letter*

88. The Tribunal notes the applicant has provided a letter from Medibank private, dated 18 March 2016, confirming the cessation of the parties' health insurance policy. I have not placed much weight on this evidence as it does not in and of itself indicate when the parties' relationship ceased, merely when their health insurance ceased.

89. *The divorce application*

90. The Tribunal has reviewed the application for a divorce, dated 8 April 2017, that identifies a date of the parties' separation as 29 February 2016. The applicant's

representative contends the sponsor had the opportunity to respond if he disagreed with this information but did not do so. The Tribunal has placed some weight on this evidence.

91. *SMS and social media*

92. Electronic communication which is claimed to have occurred between the parties in or around 10 March 2016 indicate a conflictual pattern of communication between them and an indication the sponsor had told the applicant he had withdrawn sponsorship and that she had committed fraud in her application for the subclass 801 visa. Requests for money appear to have been made by both parties in these interactions. A concern this has raised for the Tribunal is whether there is some indication the sponsor may be trying to extort money from the applicant in response to their separated relationship status. In my view, this raises concern as to the potential unreliability of both the sponsor's and applicant's evidence as to their relationship circumstances.
93. The applicant's representative has submitted the highly personal content of some of the other electronic communication between the parties is indicative of communication taking place between a couple and is unlikely to have occurred between two people after a breakdown in their relationship. The Tribunal is not convinced by this particular claim, as there can be a range of possible reasons a person may discuss matters of personal hygiene with another person, albeit one of these reasons may be because of emotional familiarity and ease between the two people. Equally however, it could convey the disdain felt by the sponsor for the applicant in his communication style.

94. *The significance of when the sponsor withdrew sponsorship and informed the Department the parties' relationship had ceased*

95. The applicant's representative submitted that because the sponsor did not formally withdraw his sponsorship until 14 March 2016 is strong evidence to indicate the parties' relationship did not break down until near the end of February 2016. The Tribunal acknowledges this may be the case, but does not consider this an entirely convincing contention, given the claims as to the sponsor trying to extort money from the applicant to support his gambling habits and the claims the applicant sought to pay the sponsor so that he would facilitate her getting permanent residency status in Australia. In light of these allegations, I am not satisfied there is any one clear meaning to be put to the sponsor's actions in relation to the applicant and her visa application.

96. *Adverse information received by the Department in October 2015*
97. The Department received information in October 2015 which is adverse to the applicant's contention the parties' relationship did not cease until 29 February 2016. The information indicated the applicant had approached a third person seeking a declaration as to the parties' being in an ongoing relationship, despite the fact they had been separated for some time. The person supplying this information also suggested the applicant offered the sponsor money to help her get her permanent resident visa. The applicant's representative has submitted this information should be regarded as unreliable as it was provided anonymously and that this should influence the weight placed on this evidence. I have reviewed this information and considered the submission made in relation to this information. I have also noted the reported electronic communication between the parties in March 2016 includes the sponsor referring to past information he was responsible for. I consider it possible this is a reference to the aforementioned adverse information provided to the Department in October 2015. However, I am satisfied it is appropriate to place some weight on this adverse information, as irrespective of whether it was provided by the sponsor or a third party, it is an indicator the parties' relationship had ceased prior to October 2015 and not, as is claimed by the applicant, in February 2016.
98. *Comments made in applicant's statutory declaration, dated 9 October 2015, which appears inconsistent with other information she has supplied regarding difficulties that were occurring in the relationship*
99. I am not satisfied the applicant has provided a plausible explanation for why, in her statutory declaration dated 9 October 2015, described her relationship with the sponsor as loving and supportive, given claims she has made elsewhere regarding the [issues] occurring in the relationship since in or around March 2015. Whilst acknowledging [people] may not always recognise the [experience] they are subject to for what it is and at other times fear to report the [experience] they are subject to, I am not convinced this is a factor in the particular circumstances of the current matter. I consider a more plausible explanation is that the applicant prepared her statutory declaration regarding the parties' relationship in the hope that the contents of this document would support her application for the subclass 801 permanent partner visa. As a consequence, I consider the lack of reference to any difficulties in her relationship in her statutory declaration, dated 9 October 2015, gives rise to concern as to the reliability of information contained in this document and also to the general reliability of information provided by the applicant as to her relationship with the sponsor.
100. *The Tribunal's conclusion as to whether the applicant has provided bogus documents, or false and misleading information in a material particular*
101. As has been discussed elsewhere in this decision, the Tribunal found Ms Novotny to be a credible witness with demonstrable qualifications and expertise in her role as a forensic document examiner. I am satisfied she provided accurate information with regard to the procedures involved in undertaking a forensic examination of the genuineness of a signature and the limitations that can apply to any such examination process. I also accept the reasons why Ms Novotny had not undertaken a formal examination of the signature in question on the statutory declaration purportedly signed by the sponsor on 9 October 2015, and as to why she had not provided specific comment as to the opinions provided by the Department's forensic document examiner. I acknowledge an initial delay in the provision of scanned copies in the requested file format and at the requested pixel density of some documents covered by a s.376 certificate, however I am satisfied documents which I

deemed appropriate to release were eventually provided in one of the requested formats and I am not persuaded that this has not accorded the applicant with procedural fairness in relation to providing comment as to the opinion of the Department's forensic document examiner.

102. I do not accept the aforementioned Departmental forensic document examiner undertook their examination of the questioned signature without neutrality or reference to generally accepted and respected industrial practice and standards for forensic examinations, as has been contended by the applicant and her representatives. Notwithstanding the potential evidentiary concerns raised by Ms Novotny and those reported to be from Dr Stach, in relation to the samples used by the Department's forensic document examiner I am not convinced it is inappropriate for the Tribunal to place considerable weight on the opinions provide by the Department's forensic document examiner. This is because I am satisfied they are a suitably qualified professional who undertook their forensic examination in accordance with procedures that are recommended for such an examination.
103. Accordingly, as discussed elsewhere in this report, the Tribunal finds the Department's forensic examination of the statutory declaration purportedly signed by the sponsor on 9 October 2015 provides qualified support for the proposition the questioned signature appearing is the product of simulation behaviour written by a writer other than the sponsor.
104. With respect to the related issue of whether the statutory declaration was written by someone other than the sponsor, the Tribunal finds the Department's forensic document examination provides very strong support for the proposition that the original statutory declaration in question has been altered. I note the applicant does not contest this possibility and I accept she has not claimed otherwise in statements she has provided to either the Department or the Tribunal.
105. The Tribunal has carefully reviewed other available evidence provided with the visa and review applications and the submissions the applicant and representatives have made with respect to this evidence as to when the parties' relationship ceased. I consider there should be some weight given to aspects of the evidence which indicate the sponsor did not withdraw sponsorship until March 2016 or seek to modify the applicant's divorce application which stated the parties' relationship ceased in February 2016. However, the weight given to this evidence has not resolved concerns I have in relation to the allegations regarding the offer or demands for money, which has been raised by both the applicant and sponsor.
106. It is apparent to me that at the very least the parties were experiencing significant conflict and disruption in their relationship throughout the second half of 2015 and in particular during the period when it is alleged the sponsor participated in the preparation of and then signed the statutory declaration in question. I consider it likely their relationship ceased before the date in February 2016 claimed by the applicant. Irrespective of the specific date the relationship ceased, I am not convinced the available evidence supports the contention the questioned signature could not be anything but genuine. I am also not convinced it is appropriate to place no weight on the sponsor's claims he did not sign this document. I consider it to be the case that the evidence strongly suggests the statutory declaration was not prepared or written by the sponsor and whilst this is a distinct issue, it does give rise to further concern as to the authenticity of the questioned signature.
107. Upon considering the overall evidence before me and the submissions made with regard to this evidence, I am satisfied the questioned signature on the statutory

declaration is not that of the sponsor. I am therefore satisfied the applicant did provide information to the Department that was false and misleading at the time it was given. I am further satisfied that the information is false and misleading in a material particular, as the statutory declaration purportedly signed by the sponsor on 9 October 2015 was provided by the applicant in support of her application for a subclass 801 permanent partner visa and was relevant to the criteria the Minister may consider when making a decision on that sort of application.

108. Therefore, the applicant does not meet PIC 4020(1).

Should the requirements of PIC 4020(1) be waived?

109. The requirements of PIC 4020(1) and (2) may be waived where there are compelling circumstances that affect the interests of Australia, or where there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen (as defined in r.1.03), that justify the granting of the visa. The decision-maker must first be satisfied that there are such circumstances, then must consider whether to exercise the discretion to waive the requirements, having regard to those circumstances: *Kaur v MIBP* [2017] FCAFC 184.

110. The expressions 'compelling circumstances' and 'compassionate or compelling circumstances' are not defined for these purposes. To be compelling, the circumstances must force or drive the decision-maker irresistibly to be satisfied: see *Plaintiff M64/2015 v MIBP* [2015] HCA 50. The ordinary meaning of 'compassionate' relates to feelings of sympathy, sorrow, pity or concern for others.

111. For the following reasons, the Tribunal is not satisfied that the requirements should be waived.

112. The applicant has made no claims with respect to there being compelling circumstances that affect the interests of Australia that would justify the grant of the visa. The Tribunal carefully reviewed the available evidence and concurs with this view.

113. As to whether there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen, the applicant submitted the sanitary conditions that exist in her home country are not as advanced as they are in Australia and that she has concern as to how this would impact on her Australian born child if she were to be required to return to China, as her child would accompany her. I note she has not provided further evidence with regard to this claim and I am not convinced by it. Sanitary conditions are not consistent across any nation, be it Australia or China and I am not satisfied the applicant has established the specific circumstances whereby her Australian citizen child would be adversely impacted by sanitary conditions in China. In forming this view, I am aware of the importance of considering the best interests of children. With respect to this consideration, I consider it relevant that both the applicant and her husband are Chinese citizens and there are not apparent constraints on their capacity to return to China. I acknowledge the applicant's stated preference to bring up her child in Australia, but after carefully reviewing the available evidence and claims made by the applicant, I am not convinced there are compassionate or compelling circumstances affecting her Australian citizen child and permanent resident partner, or other persons that justify the grant of the visa.

114. Therefore, the requirements of PIC 4020(1) should not be waived.

115. On the basis of the above, the applicant does not satisfy PIC 4020 for the purposes of cl.801.226.

DECISION

116. The Tribunal affirms the decision not to grant the applicant a Partner (Residence) (Class BS) visa.

David Barker
Member

ATTACHMENT

Migration Regulations 1994

Schedule 4

- 4020
- (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
 - (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.
 - (2) The Minister is satisfied that during the period:
 - (a) starting 3 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
 - (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
 - (2A) The applicant satisfies the Minister as to the applicant's identity.
 - (2B) The Minister is satisfied that during the period:
 - (a) starting 10 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
 - (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
 - (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
 - (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
 - (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;justify the granting of the visa.
 - (5) In this clause:
information that is *false or misleading in a material particular* means information that is:
 - (a) false or misleading at the time it is given; and
 - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

...

Migration Act 1958

s.5 Interpretation

(1) In this Act, unless contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

...